

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 1466 OF 2007

1) Mr. S. Giridharan
2) Mr. V. Sridhar ..Petitioners

Vs.

1) P. Sathyanarayanan
2) Sobhagayamal Singhavi
3) State of Maharashtra ..Respondents

Mr. K.G. Menon, Senior Advocate with Mr. Jayant L.
Phoujdar for petitioners.

Mr. K.O. Devassy for respondent no.1.

Respondent No.2 - original complainant is present.

CORAM: B.H. MARLAPALLE, J.

Date : October 24, 2007.

P.C.:

1. Heard Mr. Menon the learned Senior Counsel
with Mr. Phoujdar for the petitioners and Mr.
Devassy the learned counsel for respondent no.1.
Respondent no.2 appeared as party-in-person and the
learned APP appears for the State.

2. Rule. Respondents waive service. By consent
of the parties, Rule is made returnable forthwith.

3. The present respondent no.2 is the Proprietor of M/s. Sobhagaymal Advertising Services and he had to recover an amount of Rs.1,52,00,000/- from the accused no.1-company i.e. M/s. SRM Radiant Infotech Ltd. In discharge of the said liability acknowledged by accused no.2, the Managing Director of the said Company, vide his letter dated 12/7/2002 assured the payment latest by 15/8/2002 to the respondent no.2. He addressed another letter dated 12/8/2002 to the respondent no.2 and requested to wait for some time. Under his signatures, the following four cheques were issued to and draw in favour of the respondent no.2 in the total sum of Rs.1,40,00,000/-:-

- a) Cheque No. 539771 Rs.20,00,000/- Dt. 25-04-2002
- b) Cheque No. 539772 Rs.40,00,000/- Dt. 26-04-2002
- c) Cheque No. 539773 Rs.40,00,000/- Dt. 27-04-2002
- d) Cheque No. 539777 Rs.40,00,000/- Dt. 06-05-2002

Rs.1,40,00,000/-

. The first cheque bearing No. 539771 was dishonoured on 29/10/2002 and, therefore, respondent no.2 issued notice to the accused no.1-company as well as the present respondent no.1. Thereafter vide

:3:

letter dated 30/11/2002, the respondent no.1 -
original accused no.2 replaced all the above four
cheques by the following four cheques in the total sum
of Rs.1,40,00,000/-:-

- a) Cheque No. 133256 Rs.40,00,000/- Dt. 10-12-2002
- b) Cheque No. 133252 Rs.35,00,000/- Dt. 20-12-2002
- c) Cheque No. 133253 Rs.35,00,000/- Dt. 30-12-2002
- d) Cheque No. 133255 Rs.30,00,000/- Dt. 10-01-2003

Rs.1,40,00,000/-

. It is further alleged that the above four
cheques were again replaced vide letter dated
9/12/2002 by the following four cheques in the total
sum of Rs.1,40,00,000/-:-

- a) Cheque No. 536846 Rs.30,00,000/- Dt. 14-12-2002
- b) Cheque No. 536842 Rs.35,00,000/- Dt. 21-12-2002
- c) Cheque No. 536843 Rs.35,00,000/- Dt. 30-12-2002
- d) Cheque No. 536845 Rs.40,00,000/- Dt. 14-12-2002

Rs.1,40,00,000/-

4. But these fresh cheques were signed by accused
no.3, whereas all the earlier 8 cheques were signed by
the respondent no.1 - accused no.2. All the four
cheques were dishonoured and, therefore, three
different complaints came to be filed under Section

138 of the Negotiable Instruments Act, 1881 i.e. C.C. No.2503/SS/2005 for two cheques, C.C. No. 493/S/2003 for one cheque and C.C. No. 2525/SS/2005 for one cheque. These complaints were filed by the present respondent no.2 - party-in-person and the respondent no.1 was impleaded as accused no.2, while the petitioner no.1 was impleaded as accused no.3 and petitioner no.2 was impleaded as accused no.4. The complainant filed an application under Section 257 of Cr.P.C. in C.C. No. 2503/SS/2005 and C.C. No.493/S/2003 and prayed for withdrawn of the complaints. Both these applications were allowed. Whereas in C.C. No. 2525/SS/2005 (Old Case No. 1986/SS/2004), a separate application came to be filed for withdrawing the complaint only against accused no.2, the present respondent no.1 and the same application was allowed by the learned Metropolitan Magistrate on 28/6/2006. Hence this petition.

5. Mr. Menon the learned Senior Counsel referred to the scheme of Section 257 of Cr.P.C. and submitted that the learned Metropolitan Magistrate was required to pass a reasoned order recording his satisfaction that sufficient grounds were made out by the

complainant to withdraw the complaint only against
 accused no.2 and the order passed in the following
 words did not meet the requirements of Section 257 of

Cr.P.C.:-

"Application allowed."

. He also submitted that the present petitioners
 i.e. accused nos.3 and 4 were not heard when the
 application was allowed nor any notice was issued to
 them by the learned Metropolitan Magistrate. Mr.
 Menon referred to Section 141 of the Negotiable
 Instruments Act, 1881 regarding vicarious liability of
 the Directors when a complaint is filed against the
 Company under Section 138 of the said Act. He also
 points out that the accused no.2 was the Managing
 Director, whereas the accused nos.3 and 4 are the only
 Directors and, therefore, the responsibility and
 accountability for the day to day activities of the
 accused no.1-company was substantially of accused
 no.2. In support of these contentions, he has placed
 reliance on the decisions in the case of Sampat Singh

and ors. vs. State of Haryana and ors. [(1993) 1 SCC 561] and Provident Fund Inspector, Tirupati vs. Madhusudana Chaudhury [2001 SCC (Cri) 637]. He has also relied upon a decision of the Orissa High Court in the case of Sanjay Kumar Mohapatra and anr. vs. Unilever Venture Capital and Investment Consultants Limited and anr. [1997 Cri.L.J. 2374].

6. The respondent no.2, on the other hand, submitted that he made the application under Section 257 of Cr.P.C. before the trial court on the mistaken belief that the accused no.2 having resigned from the Board of accused no.1-company was not liable for prosecution and that he had not signed the dishonoured cheques. He, however, submitted that it was an error on his part to submit the said application before the trial court so as to withdraw the complaint against accused no.2 and, therefore, contended that he is bound by the order of this court, including the liberty, if any, available to him to withdraw the said application if such an eventuality is available to him. The learned counsel for the respondent no.1 referred to the affidavit-in-reply filed by him and emphasised that the accused no.2 had resigned with

effect from 9/12/2002 and the subject dishonoured cheques were issued subsequently. In addition, intimation about his resignation in Form No.32 was submitted to the Registrar of Companies, as required under the Companies Act, 1956 on or about 9/10/2003. He, therefore, submitted that the impugned order does not call for any interference and he relied upon the decision in the case of SMS Pharmaceuticals Ltd. vs. Neeta Bhalla and anr. **[(2005) 8 SCC 89]** in support of his contentions that the complaint has been rightly withdrawn against the accused no.2. He also referred to the provisions of Section 258 of Cr.P.C. and submitted that the trial court was competent to stop the proceeding against accused no.2 at any stage and the accused no.2 has been released, which release would have the effect of discharge. He also claimed that resignation of accused no.2 was accepted by the Board of accused no.1-company on 5/12/2002 and a resolution was passed on 9/12/2002 relieving the accused no.2 from the service of the accused no.1-company as Managing Director.

7. In the case of Sampat Singh and ors. (Supra)

it has been held that, the Court should not be

indirectly used as an instrumentality by anyone to attain or obtain any beneficial achievement which one could not get through normal legal process and that if anyone approaches the Court with ulterior motive, designed to wrench some personal benefit by putting another within the clutches of law and using the Court as a device only for that end but not to get any legal remedy, then in such a situation the Court should heavily come upon such a person and see that the authority of the Court is not misused. These observations were made while dealing with the issue of an application filed under Section 257 of Cr.P.C. Subsequently, in the case of Provident Fund Inspector, Tirupati (Supra), their Lordships held,

"Even if we accept the fact that the amount in question was paid but for exercising power under Section 257 of Cr.P.C. the condition precedent must be satisfied, namely, that a request of the complainant with sufficient grounds and recording the satisfaction of the Magistrate on such grounds, to be good grounds for allowing the complainant to withdraw the complaint. In the absence of the compliance

of the aforesaid precondition required for exercising jurisdiction under Section 257 of Cr.P.C. any order passed by the Magistrate would be without jurisdiction and would be invalid in law."

8. I may also usefully reproduce the provisions of Section 141 of the Negotiable Instruments Act, 1881 which deal with vicarious liability of the company and its Directors/Officers who are in-charge of and responsible for the day to day activities/decisions of the company.

"141. Offences by companies.- (1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

. Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence.

. Provided further that where a person

is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.-For the purposes of this section,-

(a) "company" means any body corporate and includes a firm or other association of individuals;

(b) "director", in relation to a firm, means a partner in the firm.

The scheme of Section 141 thus clearly goes to show that every Director/Officer who is in-charge of and responsible for the Company is liable for the criminal acts and thus punishment along with the company and in the name of or on behalf of the company. When one of the Directors and more particularly the Managing Director was sought to be

discharged from the complaint purportedly by filing an application under Section 257 of Cr.P.C. by the complainant, undoubtedly, the other accused - Directors will be put to adverse circumstances if they are not noticed on such application and/or not heard by the court dealing with such an application, though the scheme of Section 257 of Cr.P.C. has not so specifically provided. In addition, whether the accused no.2 had resigned or not and whether such a resignation had de facto or de jure any effect on his vicarious liability could have been gone into by the trial court after the parties adduced the evidence.

9. As noted earlier, the liability of debt/payment was acknowledged by accused no.2 vide his letter dated 12/7/2002 and the first set of cheques in the total sum of Rs.1,40,00,000/- was signed by the accused no.2 as the Managing Director and these cheques were dated 25/4/2002, 26/4/2002, 27/4/2002 and 6/5/2002. First of these cheques was sought to be encashed by the complainant and it was dishonoured on 29/10/2002. Notice was issued on 2/11/2002. The accused no.2 replaced these four cheques signed by him and these cheques were dated 10/12/2002, 20/12/2002,

30/12/2002 and 10/1/2003. If he had resigned from the post of Managing Director on 9/12/2002 there was no reason for accused no.2 to sign these cheques and in any case it would be for the trial court to consider the date of the liability, namely, whether it arose on 12/7/2002 or by issuance of the above stated two sets of cheques. If the accused no.2 was in service or was holding the post of Managing Director of the accused no.1-company on the date the liability was confirmed, the decision in the case of SMS Pharmaceuticals (Supra) may not be applicable. However, the same issue regarding the factum of the resignation of the accused no.2, the date of such resignation and the effect of such resignation to consider the vicarious liability under Section 141 of the N.I. Act or all the issues which will have to be decided by the trial court on the basis of the evidence that the parties may adduce and the onus to prove the issue of resignation and its effect lies on the accused no.2. Under these circumstances and having regards to the scheme of Section 141 of the N.I. Act it was necessary for the learned Magistrate to set out reasons satisfying himself of the sufficient grounds made out to allow the application filed under Section

257 of Cr.P.C. for the discharge of accused no.2. The order passed by him and as quoted hereinabove does not disclose any such reasons or grounds, leave alone sufficient or good grounds. Consequently, the impugned order is unsustainable and it deserves to be quashed and set aside.

10. In the result, this petition succeeds and the same is hereby allowed. Rule is made absolute in terms of prayer clause (a). The impugned order is hereby quashed and set aside and the application filed by the complainant under Section 257 of Cr.P.C is hereby restored to the file in C.C. No.2525/SS/2005. The said application shall be decided along with the main case after the parties adduced evidence. Trial of the case is hereby expedited and it is directed that it shall be completed preferably by 30/4/2008. This order will not cause prejudice to the liberty of the complainant either to withdraw the application or not to press the same during the trial of the complaint.

(B.H. Marlapalle,J.)